

422 S. Clinton Ave  
Rochester, NY 14620-1198  
Phone: (585)697-5777  
Fax: (585)232-8265

**ABVI-GOODWILL**

# Fax

To: G. John Heyer From: Gidget Hopf, President/CEO  
Fax: 703-603-0655 Date: 12/13/04  
#Pages: 8  
Re: Comments to Proposed Rules  
☐ Urgent ☒ For Review ☐ Please Reply

Association for the Blind & Visually Impaired-  
Goodwill Industries of Greater Rochester, Inc.



422 South Clinton Avenue  
Rochester, NY 14620-1198  
Tel: (585) 232-1111  
TTY: (585) 232-1698  
www.abvi-goodwill.org

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December 13, 2004

Mr. G. John Heyer  
Committee for Purchase From People  
Who Are Blind or Severely Disabled  
1421 Jefferson Davis Highway  
Jefferson Plaza 2, Suite 10800  
Arlington, VA 22202-3259

Ms. Katherine Astrich, Policy Analyst  
Office of Management and Budget  
Office of Information and Regulatory Affairs  
Eisenhower Executive Office Building  
725 - 17th Street, N.W.  
Washington, DC 20502

RE: Comments to the Proposed Rules Regarding the Javits-Wagner-O'Day  
Program

Docket # 2004-01-01; Governance Standards for Central Nonprofit  
Agencies Participating in the Javits Wagner O'Day Program, Notice of  
Proposed Rulemaking and Request for Comments; 69 Fed. Reg. 65395  
(November 12, 2004)

Dear Mr. Heyer and Ms Astrich,

The Association for the Blind and Visually Impaired - Goodwill Industries of Greater Rochester (ABVI-Goodwill) is a not for profit organization serving people who are blind or visually impaired in a 9 county region of western New York. We serve over 2000 people who are blind, of all ages each year. Our programs include vision rehabilitation, vision screening, career and training services as well as employment programs. Our employment programs provide challenging work opportunities to over 100 people who are blind in our call center, food services, manufacturing and retail divisions. Our contracts include those under the Javits-Wagner-O'Day Act (41 U.S.C. 46-48 C) ("JWOD Act"), as well as commercial contracts with local companies and New York State. If promulgated we believe our organization and people who are blind will be negatively impacted. We appreciate the opportunity to provide our comments to the Committee for Purchase From People Who Are Blind or Severely Disabled ("Committee").

Citing recent public concerns regarding isolated instances of excessive compensation for non-profit executives, a perceived lack of financial public disclosure, and the lack of formal guidelines for Board independence for JWOD-affiliated agencies, the Committee has proposed new rules that would restrict



participation in the JWOD vendor program to organizations that agree to abide by restrictions on their internal governance practices in these areas.

The employees and members of the board of directors of ABVI-Goodwill share the Committee's concern about any organization that abuses its not for profit status or engages in mismanagement to the detriment of the people it serves or the public. However, we disagree that the proposed rules, which will impact the entire community of participating non-profit agencies, are the proper mechanism to effect such change, especially in light of the Committee's own comment that the overwhelming majority of JWOD- affiliates central nonprofit agencies and nonprofit agencies operate in an ethical and accountable manner.

More importantly, a review of the JWOD statute, regulations implementing JWOD, the legislative history of the JWOD Act and federal case law cause us to conclude that the Committee does not have the authority to impose regulations regarding executive compensation and corporate governance under the JWOD Act in its present form, nor can it amend the Act to promulgate such rules.

#### **Paperwork Reduction Act**

With regard to the Paperwork Reduction Act, ABVI-Goodwill believes that the new certifications required by the Committee's proposed rulemaking are inappropriate and duplicative. Specifically, the information requested by the Committee in the form of the new certifications is the same as that required by the Internal Revenue Service ("IRS") on Form 990. The Form 990 discloses publicly a non-profit agency's finances, including administrative expenses and executive compensation. The Form 990 is readily available to the public and to the Committee staff. Accordingly, we do not believe that it is necessary or appropriate for the Committee to impose additional certification requirements on JWOD participants to obtain information that is already in the public domain, and which would impose undue hardship on our agency in compiling this duplicative information.

#### **Other Regulatory Systems Adequately Protect Citizens With Blindness and Disabilities And The Public Interest**

We have difficulty understanding why the Committee would attempt to assume regulatory authority over the governance standards for nonprofit, 501(c)(3) organizations when numerous other governmental agencies already regulate them. Congress, through the Senate Finance Committee, is scrutinizing the issue of governance standards of nonprofits. Primary oversight over a wide range of financial and governance affairs, including executive compensation, resides with the Internal Revenue Service ("IRS"). IRS is empowered to impose intermediate sanctions on nonprofits not in compliance. It would seem reasonable for the Committee to refer any abuses it perceives to the IRS rather than duplicating the effort of another government entity. Each 501(c)(3) organization must annually file a Form 990, which discloses to the public its finances, including administrative expenses and executive compensation. The IRS restricts "private benefit" and related concerns. Nonprofit vendors

December 13, 2004

2

under the JWOD program will be subject to the same standards developed for other nonprofits. Additionally, nonprofits are organized under state law. The Attorneys General and consumer protection agencies of most states enforce abuses of charitable trusts and activities. Such additional oversight by the Committee is duplicative and serves no added purpose, in our view, other than to impose arbitrary and counterproductive restrictions on the ability of many nonprofit organizations to sell their products and services to the federal government.

#### **Limitations on Committee Authority to Regulate Nonprofit Internal Management**

Section 2 of the JWOD Act (41 U.S.C. § 47) sets forth the express powers and duties Congress vested in the Committee, summarized as follows:

- Establishment of procurement list for publication in the Federal Register of commodities and services produced by a qualified nonprofit agency for the blind or severely handicapped;
- Determine fair market price of commodities and services contained on procurement list with the power to revise the price from time to time;
- Designate central non-profit agency or agencies to facilitate distribution of orders of the Government for commodities and services on the procurement list among qualified nonprofit agencies for the blind and severely handicapped;
- Make rules and regulations regarding specifications for commodities and services on the procurement list, the time of their delivery, and such other matters as may be necessary to carry out the purposes of this Act;
- Make continuing study and evaluation of its activities to assure effective and efficient administration of this Act; and
- The Committee may prescribe regulations regarding the priority in the purchase by the Government of commodities and services offered for sale by qualified nonprofit agencies for the blind and severely handicapped.

Each of these powers and duties directly advances the overall stated purpose of the JWOD Act: "to increase employment and training opportunities for persons who are blind or have other severe disabilities through the purchase of commodities and services from qualified nonprofit agencies employing persons who are blind or have other severe disabilities..." See 41 C.F.R. § 51-1.1(a).

By contrast, the Committee's proposal to expand its powers and duties to regulate the internal governance and executive compensation of participating nonprofit organizations

does not, on its face, directly advance the public policy goals Congress articulated in the JWOD Act. At least the Committee has not established an evidentiary record to make any such demonstration. Without a clear demonstration of how these new restrictions on nonprofit governance directly increase employment and training opportunities for blind and disabled citizens and augment a market for their services, the proposed rules clearly exceed the Committee's Congressional mandate. In addition, the undue focus on "regulating" is not helping to advance the goal of increasing employment for people who are blind.

In fact, we believe that the proposed rules may, contrary to Congress' goals, impede employment, training and market opportunities for many citizens who are blind and disabled. Our experience over several decades is that successful nonprofit agencies grow. Many become quite large, requiring significant managerial expertise if they are to operate efficiently in an often unpredictable market for charitable services and commodities. Were all nonprofit organizations restricted to the managerial compensation levels specified in the proposed rules, many would be unable to attract and retain the most experienced and talented personnel, particularly in high-cost-of-living metropolitan areas. The resulting loss of talent and "brain drain" would, over years, reduce employment and training opportunities for blind and disabled citizens. The soundness of this conclusion is based on over a hundred years of corporate management theory. As a practical matter, we are aware that many smaller agencies have merged with larger organizations, causing their budgets to expand significantly. Management of such organizations, with increased budget and personnel, requires a high level of skill. Salary paid is certainly a factor in attraction and retention of highly skilled employees for this purpose. In addition, for many larger organizations, only a small portion of the overall budget is a result of JWOD-affiliated work.

Finally, from our experience it seems that the Committee's preoccupation with regulating not for profit agencies is keeping it from conducting its normal day to day business. We have had several projects stalled at the Committee level and can only assume, that its focus on these proposed rules has caused it to take its eye off of the ball of advancing employment for people who are blind or have other severe disabilities. With its limited staff, it is difficult to understand how the Committee will effectively carry out its Congressional mandate while reviewing thousands of pages of duplicative documents each year.

The Committee may claim that authority to regulate nonprofit governance practices is based upon language in the JWOD Act granting the power to "make rules and regulations regarding...such other matters as may be necessary to carry out the purposes of this Act." 41 U.S.C. §47(d) (1)(C). Or the Committee may claim its power is implicit in Congress' definition of "qualified nonprofit agency" which includes those agencies "operated in the interest of blind individuals [or] severely handicapped individuals." 41 U.S.C. § 48b(3) & (4). Although these statutory provisions may appear, at first blush, to grant the Committee broad authority to carry out the purposes of the Act, in fact, this ability is restricted to rules that are "necessary" to achieve the Act's central purpose, namely to increase employment and training opportunities for persons who are blind or have other severe disabilities through the purchase of commodities and services from nonprofit agencies employing persons who

are blind or have other severe disabilities. Because the Committee is unable to demonstrate a direct and logical connection between the new regulations and the Act's stated purpose, the new rules lack the required legal authority.

### **JWOD's Legislative History Does Not Support Regulation of Nonprofit Internal Management**

The JWOD Act's legislative history provides additional guidance indicating that Congress intended the Committee to serve an administrative role over the procurement system as it relates to products and services provided by blind and disabled citizens, rather than to regulate the charitable nonprofit sector. The Committee was first established in 1938 for the stated purposes of establishing fair prices and to distribute orders among the various agencies. Authority was granted by Congress to:

Make such rules and regulations regarding specifications, time of delivery, authorization of a central nonprofit making agency to facilitate the distribution of orders among the agencies for the blind, and other relevant matters of procedure as shall be necessary to carry out the purposes of the JWOD Act.

Thus, from its inception, the Committee's powers and duties were narrowly tailored to establishing a public market for goods and services provided by the blind and disabled. It was never to supplant the Internal Revenue Service in determining the operational qualifications necessary to qualify for and maintain a tax-exempt status. Nowhere in the legislative history is there support for this procurement Committee to regulate the day-to-day workings of the participating agencies in complicated matters such as executive compensation and nonprofit trusteeship. Nor is there any suggestion in the legislative history that Congress ever thought the Committee should preempt state Attorneys General and consumer protection agencies in assessing the bona fides of hundreds of nonprofit organizations. To the contrary, it would appear that the Committee was limited to assessing the fair market value for such organizations' goods and services, whether they employed blind or disabled individuals for 75 percent of the man-hours devoted to produce those goods or services, and whether the mission and operation of such organizations was devoted to the interest of blind and disabled citizens – but not to micromanage their governance affairs. See 41 U.S.C. §§ 47(a)(1)(b) (determine fair market prices), 48b(3)(A) & (4)(A) (operated in the interest of blind and disabled individuals), and 48b(3)(C) & (4)(C) (75 percent of man-hours by blind and disabled individuals).

Had Congress intended that compensation and governance were matters necessary to carry out the purposes of the JWOD Act, it could easily have added those powers in 1971 when it amended the Act to include the powers and duties as stated in the current JWOD Act. Instead, Congress chose to specifically articulate the circumstances under which the Committee could promulgate regulations as the priority to be given to commodities produced or offered for sale by nonprofit agencies for the blind or other severely handicapped. The

Committee was also authorized to promulgate rules regarding the ability to make a continuing study and evaluation of the Committee's activities under the Act to ensure effective and efficient administration of the Act. None of the enumerated powers and responsibilities granted the Committee the authority to promulgate rules regarding executive compensation and governance as the JWOD Act was established and amended.<sup>1</sup>

Finally, both the implementing regulations and the JWOD Act set forth the same definitions as to what factors constitute a "qualified nonprofit agency". 41 C.F.R. Section 51-4; see also 41 U.S.C. Section 48b(3) and (4)(defining "qualified nonprofit for the blind" and "qualified nonprofit for the severely handicapped"). By adding executive compensation and governance as additional elements, which are outside the scope of the definition provided in the JWOD Act, the Committee effectively erodes and significantly narrows which agencies would qualify. We do not find any authority granted to the Committee that would allow such an expansion of the current definition of a "qualified nonprofit agency". See Nat'l Retired Teachers Ass'n v. United States Postal Serv., 430 F.Supp.141, 145 (D.D.C. 1977)("It is well-settled that a regulation which exceeds Congressional authorization is invalid")(citing Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue, 297 U.S. 129, 134 (1936)).

### **The Committee's Proposed Regulations on Nonprofit Organizations May Violate Profound Equal Protection Principles**

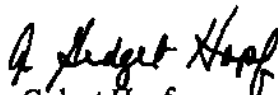
The proposed rules raise significant Constitutional concerns. Both nonprofit and for-profit agencies regularly compete for government contracts. Nonprofits compete against companies as large as Lockheed Martin and Boeing. We have not found other circumstances where the ability to participate in government contracting is contingent upon a certain corporate governance structure of the participating vendor. Additionally, not for profit hospitals generate much of their revenue from federal fund, and there is no precedent for limiting the compensation of executives of such organizations. Similarly, there is not an inquiry into the executive compensation level of the participating agency versus that of the highest paid SES, career Federal government employee for vendors to be permitted to compete for government contracting opportunities. If the proposed rules were to become final, however, only nonprofit agencies desiring to participate in the JWOD program would be subject to this unique level of regulation. Similarly, in the event compensation paid to participating nonprofit vendors' executives were to exceed the amount stated in the proposed

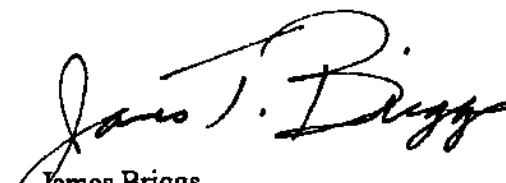
<sup>1</sup> We believe the proposed rules exceed the Congressional mandate under the JWOD Act. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988). "It remains a fundamental principle of administrative law that agencies may not self-levitate their power to promulgate regulations- they must rather find any such power in a source conferred by Congress." Respect Incorporated v Committee on the Status of Women, 815 F. Supp. 1113, 1123 (N.D. Ill. 1993). "Though an agency may promulgate rules or regulations pursuant to authority granted by Congress, no such rule or regulation can confer on the agency any greater authority than that conferred under the governing statute." Killip v. Office of Personnel Management, 991 F.2d 1564, 1569 (Fed. Cir. 1993)

regulation, only these nonprofit organizations would be required to breach their contractual obligations as set forth in the executives' employment contracts in order to reduce the level of compensation commensurate with the proposed rules. There is no rationale for such disparate treatment of nonprofit organizations desiring to participate in the JWOD program and no precedent for establishing a cap on executive compensation or imposing governance rules as a prerequisite to participation in government contracting. Finally, the rule that requires nonprofit agencies to report the median compensation package for the nonprofit agency's direct labor hour workers and how that median compares to the compensation packages offered to executives, fails to acknowledge an important fact. This is, that a significant number of people who are blind and employed in our organizations have earnings limitations placed on them by the social security administration so that they may continue to collect their S.S.D.A. benefit.

For the reasons stated herein, we believe the proposed rules exceed the authority of the Committee, may reduce opportunities for blind and disabled citizens, will pose undue hardship on our organization and should be withdrawn.

Very truly yours,

  
A. Gidget Hopf  
President and CEO

  
James Briggs  
Chairman of the Board of Directors

cc: Ms. Janet Yandik  
Information Management Specialist  
Committee for Purchase from People who are Blind  
Or Severely Disabled

December 13, 2004

7